LOH WAI LIAN

v.

S.E.A. HOUSING CORP. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. F 210 OF 1982]
29 SEPTEMBER 1983

CONTRACT: *Sales and purchase agreement to purchase house - Late delivery of vacant possession - Liquidated damages.*

LIMITATION: *Accrual of cause of action - Limitation period for actions arising out of contract - Definition of 'cause of action'*

CIVIL PROCEDURE: *Summary judgment - Appeal against decision of Senior Assistant Registrar.*

The defendant appealed against the decision of the Senior Assistant Registrar in giving leave to the plaintiff to enter final judgment under O. 14 of the Rules of the High Court 1980 for liquidated damages for breach of contract. The sales and purchase agreement for the purchase of a 3½ storey terrace house was executed on 18 March 1974. The agreement provided that vacant possession would be delivered to respondent not later than 18 months from the date of the agreement i.e. on or before 18 September 1975.

The house was not completed until 7 November 1977. The agreement provided that the appellant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said house up to the date of actual completion and delivery of possession. The respondent filed a civil action for liquidated damages for breach of contract on 7 September 1982. The appellant pleaded in his statement of defence that the action was time-barred.

Held:
The respondent's action which was filed on 7 September 1982 was statute-barred. The "right to sue" was established upon a breach under the agreement and a breach was committed on the expiry of the 18 months period from the date of the signing of the agreement. The respondent should have filed the action within six years from the date of delivery of vacant possession under the agreement i.e. within six years from 18 September 1975.

[Appeal allowed with costs.]

Cases referred to:
S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ (Rep) 305
Nasri v. Mesah [1971] 1 MLJ 32
Bolo v. Koklan & Ors. LR 57 IA 325

Legislation referred to:
Limitation Ordinance 1953, s. 6(1)
Rules of the High Court 1980, O. 14

Other sources referred to:
Chitty on Contracts

For the appellant - David Lingam; M/s. Akhir & Partners
For the respondent - Joginder Singh; M/s. Joginder Singh & Co.

JUDGMENT

Mohamed Dzaiddin J:

This is an appeal by the defendant against the decision of the Registrar in giving leave to the plaintiff to enter final judgment under O. 14 of the Rules of the High Court for liquidated damages for a breach of contract.

The facts are as follows. On 18 March 1974, the respondent executed a sales and purchase agreement with the appellant to purchase a 3 1/2 storey terrace house at the price of RM175,000. The agreement provides that the house was to be completed and vacant possession to be delivered to the respondent not later than eighteen months from the date of agreement, i.e. on or before 18 September 1975. However, the house was not completed until 7 November 1977. It is a term of the said agreement that the appellant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said house up to the date of actual completion and delivery of possession. Since November 1977, nothing had taken place between the respondent and the appellant until 21 April 1980 when the respondents through the solicitors wrote to the appellant alleging a breach of the agreement and demanded payment of RM29,972.01 being liquidated damages. Then, on 7 September 1982, the respondent filed a civil action for liquidated damages for breach of contract. On 10 December 1982, the appellant entered a defence; and paragraph 3 of the said defence states as follows:

> ... the Plaintiff's alleged cause of action did not accrue within six (6) years before the commencement of this action and therefore any claim against the Defendant herein, which is not admitted, is time barred under the Limitation Ordinance, 1953.

It appears from the record that the appellant has abandoned other defences in view of the Federal Court decision in *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ (Rep) 305.

On 14 October 1982, the respondent applied for summary judgment and the matter was heard by the learned Registrar on 14 April 1983 who held that "In this situation, the action brought by the plaintiff is still within the six year period and hence, I have allowed the plaintiff to enter judgment against the defendant".

This appeal is centred on just one question: when did the respondent's cause of action accrue?

Counsel for the appellant submitted that the cause of action in this case accrued on the day when vacant possession was supposed to be delivered, i.e. on or before 18 September 1975, because the cause of action accrued on the breach of the agreement.

The respondent, on the other hand, contended that time started to run from the date of actual delivery of vacant possession (7 November 1977). Therefore, she was still within time when she filed the action on 7 September 1982.

Section 6 (1) of the Ordinance provides that in the case of actions founded on a contract, the period of limitation shall be six years from the date on which the cause of action accrued. It has been said in *Chitty on Contracts* that the ascertainment of this date is often the question of some difficulty. There is no definition of the term "cause of action" in the Ordinance. There are, however, a few English authorities on this point. In *Nasri v. Mesah* [1971] 1 MLJ 32 at page 34, Gill FJ (as he then was) stated as follows:

A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown*). In *Reeves v. Butcher* Lindley LJ said:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

In *Board of Trade v. Cayzer, Irvine & Co.* Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild*). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case). It would seem clear, therefore, that the expressions "the right to sue accrues", mean one and the same thing when one speaks of time from which the period of limitation as prescribed by law should run.

In the above case, the appellant claimed for specific performance of an agreement whereby the respondent agreed to sell to him certain land. The appellant had paid the agreed price for the land but no document of transfer was executed because of the moratorium then in force. After the expiration of the moratorium, the appellant approached the respondent on several occasions and requested her to execute a transfer of the land. Eventually, the appellant commenced the action. The High Court dismissed this action on the ground of limitation. On appeal, the Federal Court in allowing the appeal held:

(1) in this case whether the action was for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover land, and the period of limitation therefore would be twelve years;

(2) time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

The learned Registrar in her grounds of judgment, referred to the decision of *Bolo v. Koklan & Ors.* LR 57 IA 325, a Privy Council case in which it was said at page 331:

> There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

In my opinion, the principle in *Bolo's case* is not applicable to the present case. Here, the 'right to sue' is established upon a breach under the agreement and a breach is committed on the expiry of the eighteen months period from the date of the signing of the agreement. In my judgment, time runs from the date of the breach which is immediately after the date of delivery of vacant possession under the agreement, i.e. six years from 18 September 1975. In such circumstances, the respondent's action which was filed on 7 September 1982 is statute-barred.

I allow this appeal with costs (including costs of O. 14 proceedings) to the appellant.

Also found at [1984] 1 CLJ 176